IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.312 OF 1994

The State of Maharashtra .. Appellant

Vs.

1. Kisan Nathu Pardeshi
   Age - Adult, Occ-Vegetable
   Merchant, R/at 135/E, Ward,
   Lonavala, Dist. Pune.
2. Sunil Motiram Pardeshi
   Age - Adult, Occ-Rikshaw
   Driver, R/at 135/E, Ward,
   Lonavala, Dist. Pune.
3. Balu Atmaram Chavan
   Age-Adult, Occu-Service.
   R/at 123/E Ward, Lonavala,
   Dist. Pune.
4. Jamil Abbas Sayyad
   Age-adult, Occu-Contractor,
   R/at 143/E Ward, Lonavala,
   Dist. Pune.
5. Kailas Narayan Wagh
   Age-adult, Occ- Rickshaw Driver,
   R/at 175/E Ward, Lonavala,
   Dist. Pune. .. Respondents
   (Org.Accused Nos.
   1 to 5)

Mr. B.H. Mehta, APP for Appellant-State.
Mr. R.R. Bhosale for Respondent Nos.1 to 4.
Respondent No.5 reported to be dead.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : October 25, 26 & 27, 2004.

ORAL JUDGMENT (Per S.S. Parkar,J.):

1. This appeal is filed by the State against the order of acquittal dated 21/1/1994 passed by the Additional Sessions Judge, Pune acquitting all the respondents-accused of the offence of murder in

Sessions Case No.391 of 1991.

2. The prosecution case briefly stated is as follows:-

. The respondents-accused were charged for the offences under Sections 147, 148, 302 read with Section 149 and alternatively read with Section 34 of IPC in respect of murder of one Mustaffa which took place on the night of 13th July 1989 at Lonavala, a Hill Station in the District of Pune. The incident of assault had taken place in front of Central Hotel which is situated in Jaichand square. That night deceased Mustaffa along with his two friends, complainant Manohar Ingolkar PW 8 and Nasir Shaikh PW 6 had met in Central Hotel. At about 10.30 p.m. when the hotel was closing they came out of the hotel and were chit-chatting in front of the said hotel near the motorcycle of the deceased which was parked there. When they were chit-chatting, PW 7 Akram Pathan, an auto-rickshaw driver, went there along with a passenger and asked them to wait for him till he returned after dropping the passenger at his destination as he wanted to fix program with them on the occasion of Id which was to take place on the following day. After PW 7 left with his rickshaw,

five accused persons rushed towards Mustaffa and his friends with weapons in their hands. Accused Nos.1 and 2 came from the side of Punjab Hotel and Mamta Cold Drinks, while accused nos.3 to 5 came there from the side of the road situated on the front side of the Central Hotel. All the five accused started assaulting Mustaffa with the weapons in their hands. Apprehending danger to their lives, Manohar and Nasir ran away from that place. While Manohar PW 8 ran towards Railway Bridge, Nasir PW 6 ran towards Royal Bakery Chowk. PW 7 Akram Pathan who had gone to Gavli Naka along with the passenger came back near the Central Hotel along with his friend Kamar Ansari PW 11. Since nobody was present near the Central Hotel and the motorcycle of the Mustaffa was parked there, auto-rickshaw was taken towards Jakatnaka. At Jakatnaka Akram and Kamar heard voice uttering "ma", "ma" in pain. They recognised the said voice of Mustaffa. When they turned towards the place from where they heard the voice of Mustaffa, they saw Mustaffa lying in the lane between Jakatnaka and Bhagyalaxmi Bhail Bhandar. Said place is about 96 ft. from the Central Hotel. Mustaffa was lying in pool of blood. On enquiry by them Mustaffa told them that respondents-accused assaulted him by means of swords. PWs 7 and 11, therefore, lifted him and put him in the

auto-rickshaw and proceeded to take him at Parmar Hospital which is situated in Royal Bakery Chowk. Meantime, PW 6 Nasir, who had run towards the police station which is situated near Royal Bakery Chowk, had met two constables on the way i.e. PW 12 constable Jagtap and constable Chavan. He informed them that five accused named by him were assaulting Mustaffa with swords. When the constables along with Nasir were rushing towards the Jaichand square, on their way, they met PW 13 constable Patil and informed him about the assault taking place in the square. On their way towards the place of offence, auto-rickshaw of PW 7 Akram came from the opposite side and stopped near them. Akram informed the police that five respondents-accused named by him had assaulted Mustaffa and they were taking Mustaffa to the hospital. PW 13 police constable Patil went to Parmar Hospital in the same autorickshaw and the other two constables went to the spot. Complainant Manohar PW 8, who had run away towards Railway Station also returned in the midst of the passengers after arrival of the local train. He also noticed that Akram was carrying Mustaffa in the auto to Parmar Hospital. So he also went to the said hospital. PW 6 Nasir also arrived at the said hospital. In the hospital Dr. Parmar gave first aid to the injured and advised to

remove the injured to Sassoon Hospital, Pune immediately. The injured was thereafter taken to Sassoon Hospital, Pune in the car. Injured was accompanied by PW 6 Nasir and PW 11 Kamar and the members of the injured's family. In the night PW 13 had gone to the police station and narrated above incident to PSO who issued written requisition requesting Dean of Sassoon Hospital for examination of the patient. The said letter was handed over to police constable Thorat who also accompanied injured to Sassoon Hospital. In the Sassoon Hospital injured was declared dead. When the car taking injured to Sassoon Hospital left Parmar Hospital of Lonavala, rickshaw driver Akram took the complainant Manohar in his auto-rickshaw to Lonavala Police Station where Manohar PW 8 lodged complaint giving all the relevant details, on the basis of which crime was registered under C.R. No.92 of 1989 for offences under Sections 307, 147, 148 and 149 of IPC. Crime was registered at about 11.35 p.m. on that night.

3. After registering the crime, PI Bival PW 15, the Investigating Officer visited the place of offence along with panchas and complainant Manohar and drew the spot panchanama Exh.76. The motorcycle of the deceased Mustaffa was found parked in front of the

Central Hotel and near the motorcycle two pairs of chappals were seen which were seized under spot panchanama. One of the pairs of chappal belonged to the deceased while the other belonged to the complainant Manohar. They also visited the place between Jakatnaka and Bhagyalaxmi Bhail Bhandar where the injured Mustaffa was lying, from where they collected blood in a bottle and seized the same. The spot panchanama was drawn between 12 p.m. and 1 a.m. at night. At about 1.40 a.m. PI Bival received message from Bundgarden Police Station about the death of Mustaffa and, therefore, offence registered under Section 307 of IPC was converted to offence under Section 302 of IPC. Inquest panchanama Exh.71 was drawn on 14/7/1989 at 11.30 a.m. and the clothes of the deceased were seized in the evening. The dead body was sent for post-mortem examination. In the post-mortem 28 injuries were noticed on the dead body which were in the nature of incised wounds, stab wounds and abrasions etc. Cause of death given was haemorrhagic and shock as a result of injuries. On the same day statements of the witnesses were recorded. The search for the accused had started after crime was registered. But they could not be traced until 20th July 1989. They were arrested from the forest of village Bushi on the basis of

information received by PI Bival. They were arrested under arrest panchanama dated 20/7/1989 at 9.30 p.m. Accused Nos.1 to 5 were sent for medical examination to Dr. Saswade PW 14. The clothes of the accused also were seized under panchanama in the night of 20/7/1989 at about 11.50 p.m. The clothes of the accused were also found stained with blood. On 22/7/1989, while in custody, accused no.1 volunteered to produce the weapons of assault used by all the accused from the place where they were hidden. Accordingly the accused had led the police and panchas to Hanuman Tekadi where the weapons were concealed. From the said place two swords, two daggers and one steel pipe were recovered. The blood samples of the accused were also collected. All the seized articles were sent to the office of C.A. on 3/8/1989. Through the Circle Officer map of the place of offence was prepared. After completing the investigation charge-sheet was filed on 10/10/1989 in the Tada Court as provisions of Tada Act were made applicable. On 26/10/1991 the Designated Court, Pune held that offences under the provisions of Tada Act were not made out and, therefore, that court transferred the case to the Court of J.M.F.C., Vadgaon, who committed the case to the Sessions Court.

4. Before the Sessions Court, charges were framed against all the five accused for offences under Sections 147, 148, 302 read with Section 149 and in the alternatively for offence under Section 302 read with Section 34 of IPC. All the accused pleaded not guilty to the charge framed against them.

5. On behalf of the prosecution 15 witnesses were examined, amongst them are two eye witnesses i.e. PW 6 Nasir Shaikh and PW 8 Complainant Manohar Ingolkar. PW 7 Akram Pathan, an auto-rickshaw driver and PW 11 Kamar Ansari have deposed about the oral dying declaration made by the injured Mustaffa to them when they saw him lying in injured condition and they also took him in the rickshaw to Parmar Hospital. PW 10 is Dr. Parmar who examined the injured at 11 p.m. in his hospital. PW 9 is Dr. Kevaliya, who performed autopsy on the dead body. PW 14 is Dr. Saswade who had examined injured accused nos.1 and 5 after their arrest. PWs 12 and PW 13 are constables Jagtap and Patil who had met the eye witness PW 6 Nasir on the way and PWs 7 and 11 while taking the inured to Parmar Hospital, out of whom constable Patil had accompanied the injured to the hospital in the autorickshaw. PW 1 is Yashwant Kedari who acted as panch for spot panchanama while PW 2 is Sushil Gupta who acted as

panch for seizure of clothes of the accused. PW 3 is Imtiaz Khan who acted as panch for the arrest panchanama of the accused and PW 4 is Raju Naidu who acted as panch for the recovery of the weapons made at the instance of the accused no.1. PW 5 is Sambhaji Shinde, the Circle Officer who drew the map of scene of offence Exh.96. Lastly, PW 15 is PI Bival who investigated the case. The defence of the accused was of total denial and false implication due to enmity. On behalf of the defence Dr. Pherwani has been examined with a view to prove that due to injuries deceased must be unable to make any statement.

6. After considering the evidence led by the prosecution and the defence of the accused, the trial court has acquitted all the respondents-accused of the offences with which they were charged by disbelieving the eye witnesses as well as other evidence and giving benefit of doubt. The said order of acquittal is under challenge in this appeal filed by the State.

7. We have gone through the oral as well as documentary evidence produced on record and heard both the sides and have also perused the reasoning of the trial judge, who has after considering the lengthy cross-examination of the witnesses permitted by him

held that the witnesses did not prove the prosecution case against the accused beyond reasonable doubt. While the argument was going on, the Additional Public Prosecutor, who appeared in the appeal, was showing the omissions and minor discrepancies in the evidence of main prosecution witnesses until he was asked by the court whether he is supporting the said appeal or the impugned judgment of the trial court, whereupon he changed his trend. Yet no serious effort was made to point out why the judgment of the trial court should be set aside. We, therefore, had to minutely go through the entire evidence of the prosecution witnesses and the documents placed on record with a view to appreciate the arguments advanced on behalf of the defence and reasoning of the trial court.

8. The prosecution case is based mainly on the evidence of two eye witnesses, one of whom has lodged the complaint within short time of the incident immediately after the injured was admitted to nearby hospital of Dr. Parmar. The corroborating circumstances relied on behalf of the prosecution are; the evidence of two witnesses on the oral dying declaration, the circumstance of the accused absconding from their houses for a period of one week and their arrest from forest pursuant to the

information received by the police. Then there is evidence of seizure of blood stained clothes from the persons of the accused and the discovery of blood stained weapons at the instance of the accused while in custody. The evidence of two eye witnesses, including the complainant and the two witnesses who have deposed about the oral dying declaration has been corroborated by two constables PW 12 Jagtap and PW 13 Patil who met the four witnesses immediately after the incident at the time of taking the injured to the nearby hospital of Dr. Parmar. While the incident appears to have taken place at about 10.30 p.m. in the night, complaint was lodged at about 11.20 on the same night naming all the five accused persons on the basis of which crime was registered, inter alia, not for offence under Section 302 but for offence under Section 307 of IPC because at that time the injured had not died and was declared dead in the Sassoon Hospital, Pune. Thereafter the offence was converted under Section 302 of IPC.

9. PW 8 complainant Manohar is a resident of same town Lonavala who knew the deceased as well as the other witnesses and all the accused persons. He was also an autorickshaw driver doing day-ship. He has deposed that on the night of the incident he went to

Central Hotel at about 9.15 p.m. and after some time deceased Mustaffa arrived there on his motorcycle. He parked the same in front of the Central Hotel and went inside the hotel. They used to meet daily each other in the Jaichand square where the said hotel is situated. After some time PW 6 Nasir who was also called as Raju also went there. They came out of the hotel because it was closing time of the hotel. Thereafter they were chit-chatting outside the hotel near the motorcycle of Mustaffa. That time PW 7 Akram went there in his rickshaw, in which he was carrying a passenger. He told them to wait for him till he returns after taking the passenger to his destination for settling the program of Id day. After Akram left, accused nos.1 and 2 came with swords from the lane of Punjab Restaurant and accused nos.3 to 5 also armed with weapons came from the opposite side. They started assaulting Mustaffa with the weapons in their hands. Mustaffa was raising shouts. Complainant Manohar and Nasir, therefore, ran away from that place. Manohar went towards railway station and after arrival of the local train, came back along with the passengers. On the way he saw Akram carrying Mustaffa towards hospital and, therefore, he also went to Parmar Hospital. Thereafter Nasir came there. From that hospital injured Mustaffa was taken to Pune.

Nasir and Kamar went with the injured to Pune in the car. Manohar had told Akram about the assault by accused persons with swords. Akram also told him that Mustaffa told him that five accused persons had assaulted him with swords. He then went to police station in the autorickshaw of Akram. He narrated the incident to the police. Same was reduced to writing, which is Exh.103. Thereafter he along with the police and panchas went to Jaichand square. In front of Central Hotel motorcycle of deceased Mustaffa and two pairs of slippers were lying. At Jakatnaka blood stains were found when police drew spot panchanama. He has identified swords article nos. 16 and 17 shown to him stating that accused were also holding swords like those articles. The evidence given by the complainant Manohar, who was an eye witness, has been fully corroborated in more essential particulars by his complaint Exh.103. His evidence is also supported by another eye witness Nasir Shaikh PW 6.

10. PW 6 Nasir Shaikh had gone to the Central Hotel on the night of the incident at about 10.15 p.m. That time Mustaffa and complainant Manohar were taking meals. He took tea. As hotel was to be closed at 10.30 p.m. all the three came out of the hotel and were chit-chatting near the motorcycle of Mustaffa

which was parked outside that hotel. He has also deposed that seeing them, PW 7 Akram, who was proceeding towards Bombay-Pune road with a passenger, stopped near them and asked them not to go away as he had to plan for Id day's program which was scheduled on the following day. Some time after Akram left, accused nos.1 and 2 came towards them from the side of Pubjab Hotel with swords in their hands. Accused nos.3 to 5 came from the road in front of the Central Hotel. They were also armed with swords. All the five accused started assaulting Mustaffa with the weapons in their hands and, therefore, he and complainant Manohar started running away. While he ran towards the Police Station, Manohar ran towards Railway Bridge. When he was running away he met two policemen at Royal Bakery whom he told about the assault on Mustaffa by the accused persons. Therefore, policemen started going towards the place of the incident along with the witness. When they were proceeding towards the place of incident the witness noticed Akram taking injured Mustaffa in the autorickshaw to the Parmar Hospital. He, therefore, went to Parmar Hospital. Both the eye witnesses i.e. this witness and complainant Manohar PW 8 have stated about the lights in Jaichand square. He has stated that on that night pairs of chappal of Mustaffa and of

himself remained at the place from where they started running away. He has identified the leather chappals belonging to him and slippers belonging to Mustaffa. He has stated that accused were carrying similar types of swords as article nos.16 and 17 which were recovered at the instance of the accused. Like complainant Manohar, this witness also was subjected to the lengthy cross examination by the different advocates who are representing different accused. Different accused were represented by four advocates. While accused nos.1,2 and 3 had their own separate advocates, accused nos.4 and 5 were represented by one common advocate.

11. The evidence of Nasir PW 6, an eye witness, has been corroborated to certain extent by PW 12 Constable Jagtap that at about 11 p.m. he was proceeding from Royal Bakery Chowk to police station for his night duty. At the Royal Bakery Chowk Police Constable Chavan met him. When he was talking to constable Chavan, PW 6 Nasir came running and informed him that accused persons, named by him, were assaulting Mushtaffa with swords. When he was told about this incident of assault by Nasir, he along with constable Chavan went towards Jaichand square. On the

way constable Patil met them, who also accompanied them. On their way rickshaw coming from opposite direction stopped near them. Said rickshaw was driven by Akram Pathan PW 7. He informed the police constables that five accused named by him assaulted Mushtaffa. He has also deposed that one Kammu i.e. Kamar Ansari PW 11 was also in the auto-rickshaw at that time. He had sent constable Patil in that rickshaw along with the injured to hospital and the other two constables went to Jaichand square. They saw motorcycle was parked in front of the Central Hotel. They also noticed two pairs of chappals lying there. When they went to Jakatnaka, they noticed blood there. He then asked constable Chavan to remain on the spot and he went to the police station. This witness has also thus corroborated and supported the evidence of auto-rickshaw driver Akram Pathan PW 7.

12. PW 7 Akram Pathan, an autorickshaw driver has deposed that he was plying the autorickshaw in the nightship, while his brother used to ply during day time. He knew the deceased as well as the eye witnesses and all the five accused since his childhood. On the night of incident at about 10.40 p.m. he was proceeding with the passenger from Jaichand Chowk to Gavlinaka. That time he noticed

deceased Mustaffa, complainant Manohar (PW 8) and Nasir (PW 6) present in front of Central Hotel. He asked them to wait for him for chalking out Id-day program and went to Gavlinaka with the passenger. While returning, he met his friend Kamar Ansari PW 11 near octroi post of Gavlinaka. He told Kamar Ansari that Mustaffa, Manohar and Nasir were waiting for him and asked him also to accompany him for settling Id-day program. Along with Kamar he went to Jaichand stand where eye witnesses along with Mustaffa were supposed to be waiting. But none was there and only motorcycle of Mustaffa was standing there. It was about 11 p.m. He, therefore, returned to Jakatnaka of Jaichand chowk along with PW 11 Kamar. While returning, he heard voice uttering "ma", "ma". He identified that voice to be of Mustaffa and, therefore, went near that place. They saw Mustaffa with injuries on his cheek, face and hand etc. On being asked Mustaffa told him that five accused named by him assaulted him with swords. Injured Mustaffa had given him the names of accused as Jamir, Sunya Paredeshi, Kishya Pardeshi, Balaya and Kailas. According to the witness accused no.1 Sunil Pareshi is know as Sunya Pardeshi, Accused no.3 Ballu Chavan is known as Ballya, Accused No.4 Jamir Sayyad is known as Jamir and Accused No.5 Kailas is known as Kalya. Then

he along with PW 11 Kamar lifted Mustaffa and put him in autorickshaw for taking him to Parmar Hospital. On the way constable Patil met them near the square. He informed police that all the accused had caused injuries to Mustaffa and, therefore, they were carrying him to the hospital. He further stated that the constable also sat in the rickshaw and went to Parmar Hospital. That time PW 6 Nasir reached there and both of them called doctor from his house. Doctor gave first aid to the injured and told them that patient was serious and he should be removed to Sassoon Hospital, Pune. Manohar PW 8 was also present outside the hospital. He informed Kamar to arrange for a vehicle as Mustaffa was serious. The witness along with Kamar went to the house of Deepak Poojari in search of car. As the car of Poojari was not there they went to Bangarwadi. Meantime car of Mustaffa had arrived and Mustaffa was taken in the car to Pune accompanied by Nasir. Complainant Manohar who was there near the hospital told the witness about the incident of assault by accused on Mustaffa. Thereafter he took Manohar in his autorickshaw to the police station to lodge the report. The police station is hardly 150 ft. from Parmar Hospital.

13. PW 7 has been corroborated by the evidence of

PW 11 Kamar Ansari. He has deposed that at about 10 p.m. on that night he went to Gavlinaka for taking tea. When he was returning he met PW 7 Akram at Jakatnaka. He told him that Mustaffa, Raju and Manohar were waiting at Jaichand square and he wanted this witness to accompany him to that place for fixing the Id program. When he went in the autorickshaw of PW 7 to Jaichand square in front of Central Hotel, motorcycle of Mustaffa was standing but no one was present there. Thereafter the autorickshaw was taken near Jakatnaka. At Jakatnaka he heard the voice "ma", "ma" in between Jakatnana and Bhagyalaxmi Bhail Bhandar. He recognized the voice of Mustaffad. So they went near him. Mustaffa was lying injured with bleeding injuries. On inquiry by Akram Mustaffa named five accused persons who have assaulted him with swords. Mustaffa was, thereafter, lifted and kept in autorickshaw for taking him to the hospital. While proceeding towards hospital three police constables met them on the way. Akram stopped rickshaw and informed the police about five accused having assaulted Mustaffa and that they were taking Mustaffa in the hospital. One of the police constables sat in the auto and other two went towards Jaichand square. They took Mustaffa to Parmar Hospital. When they were making inquiry with the nurse about the doctor, Nasir

PW 6 reached there and thereafter they called the doctor from his house. After doctor examined the injured Akram PW 7 came out of the hospital and told this witness that doctor advised him to shift the patient to Sassoon Hospital and, therefore, he and Akram went to search Deepak Poojari for the vehicle. But in the meantime car of Mustaffa arrived and Mustaffa was taken to the Sassoon Hospital. He has also deposed that Manohar had also arrived at the hospital. He also accompanied the injured in the car while Akram and Manohar remained there at Lonavala. At Sasson Hospital doctor examined Mustaffa and declared him dead. Thereafter this witness with Nasir PW 6 and Jaywant Dalvi returned to Lonavala in the same car and went home. Nasir and Jaywant went in that car to the place of incident i.e. Jaichand square.

14. The evidence of aforesaid four witnesses out of whom two are eye witnesses to the incident has been corroborated to certain extent by police constables examined by the prosecution. They are PW 12 Constable Jagtap and PW 13 Constable Patil. PW 12 constable Jagtap was at the relevant time attached to Lonavala City Police Station as a writer constable. On the night of the incident he was proceeding from Royal

Bakery Chowk to police station at about 11 p.m. for his night duty. At Royal Bakery square he was talking with constable Chavan who met him there. That time PW 6 Nasir, known to him, came there running and told him that accused persons named by him were assaulting Mustaffa. Then he and constable Chavan rushed towards Jaichand square. On the way they met constable Patil whom they told that the incident of assault was going on in the square. Constable Patil also, therefore, accompanied them. When they were proceeding towards Jaichand square one rickshaw, which was coming from opposite direction, halted near them. That rickshaw was driven by PW 7 Akram Pathan. He told them that five accused named by him had assaulted Mustaffa and, therefore, they were taking Mustaffa to the hospital. This witness has also deposed that one Kammu (Kamar Ansari PW 11) was also sitting in the said autorickshaw. Constable Jagtap, therefore, sent constable Patil in that autorickshaw and he himself proceeded towards Jaichand square along with the other constable. When they reached in front of Central Hotel they saw one Indu-suzuki motorcycle standing there and two pairs of chappals lying on the spot. They saw blood lying near the Jakatnaka. He then asked constable Chavan to wait there on the spot and he himself went to the police station.

15. Constable Jagtap PW 12 is also corroborated by constable Patil PW 13. This constable was also attached to Lonavala City Police Station. On the night of the incident he got down at Lonavala Station by local train from Pune at about 11 p.m. He was going towards Lonavala Police Station. From the railway bridge he went to Royal Bakery Square. There he noticed constable Jagtap and constable Chavan running towards Jaichand Square. They informed him that at Jaichand Square five accused named by them were assaulting Mustaffa with swords. On their request he also joined them for proceeding towards Jaichand Square. That time one autorickshaw came from opposite direction and halted near them. That rickshaw was driven by Akram PW 7 and one Kammu i.e. PW 11 Karam Ansari was sitting in that rickshaw and Mustaffa was lying in injured condition. Akram told them that Mustaffa informed him that Balu, Kisan, Jamir, Sunil and Kailas assaulted him with swords and that he was lying near Naka of Jaichand square from where they lifted him and were taking him to the hospital. Constable Jagtap asked him to go to the hospital in the same autorickshaw. When they reached Parmar Hospital PW 6 Nasir also came there. Doctor examined the patient. PW 8 Manohar also was present

near the hospital. Thereafter they went to the police station and narrated the incident to the PSO Head Constable Dhaka, who gave requisition letter to Police Constable Thorat for examination of patient. Constable Thorat went to Pune along with Mustaffa.

16. Thus there is evidence of two eye witnesses PW 8 complainant Manohar and PW 6 Nasir who had witnessed the assault by five accused with weapons like swords on Mustaffa out side the Central Hotel. One of those two eye witnesses i.e. Manohar Ingolkar had lodged complaint before 11.30 p.m. at Lonavala Police Station on the basis of which crime was registered mainly under Section 307 of IPC. The presence of these two witnesses has been deposed to by PW 7 Akram, an autorickshaw driver who had asked them to wait there for settling the program of Id day which was scheduled on the next day. PW 7 had seen two eye witnesses along with deceased Mustaffa standing outside the said hotel talking with each other. He went and asked them to wait till he returns. When he returned after leaving the passenger at his destination no one was present there and therefore he went towards the square where he heard the voice of injured Mustaffa. At that time he was accompanied by Karam Ansari PW 11.

17. Two police constables i.e. PW 12 Jagtap and PW 13 Patil have also corroborated and deposed about the presence of three witnesses i.e. PW 6 Nasir, PW 7 Akram, an autorickshaw driver and PW 11 Kamar Ansari. Nasir was the first person who met police constables when he was going towards police station after seeing the assault by the accused on Mustaffa. When he met constables Jagtap and Chavan at the Royal Bakery square, Nasir told them that Mustaffa was being assaulted by five accused persons. While on their way towards Jaichand square Akram coming from opposite direction halted autorickshaw and told constables that he was taking Mustaffa to the hospital. Akram also told the constables that Mustaffa had told him that the five accused persons had assaulted him with swords and, therefore, one of the constables i.e. PW 13 Patil accompanied the injured in the same auto to the hospital. This witness has also deposed about the presence of complainant Manohar at the hospital. After seeing the assault on Mustaffa, Manohar PW 8 had run away towards station side. From there he returned in the midst of the passengers who got down from the local train at Lonavala Railway Station. On the way he noticed Akram carrying Mustaffa in his auto towards hospital and, therefore, he also went to the hospital.

After Mustaffa was taken to Sassoon Hospital, Pune on the advice of Dr. Parmar, the complainant was dropped at the police station by Akram by his autorickshaw where he lodged his complaint. All these six witnesses had met and interacted with each other within the short span of about half an hour. The events had taken place in quick succession. No one had time to think. Yet, the conduct of each of the witnesses appears to be absolutely natural in the facts and circumstances of the case. PW 8, the complainant and PW 6 who had also seen the initial assault by all the five accused persons with weapons like swords outside the Central Hotel had no alternative but to save their own lives. They were not expected to intervene in that assault when the accused persons had grievance even against the complainant Manohar. The criticism that these witnesses not having intervened in the assault their conduct is unnatural is itself unwarranted and unjustified. When five persons armed with deadly weapons were assaulting Mustaffa, it was not expected of the two eye witnesses, Manohar and Nasir to intervene in which case they would also have been assaulted. The only way for them to escape was to run away from that place, especially when these two witnesses were from the group of the victim and

Manohar was prosecuted previously for assault on one of the accused. It would have taken extra ordinary courage for these two eye witnesses to intervene when Mustaffa was being assaulted by five persons with deadly weapons.

18. After extorting certain answers in the lengthy and protracted cross-examination on irrelevant points, it was contended on behalf of the defence, which contention was upheld by the trial court, that when the witnesses i.e. PW 6 Nasir and PW 8 Manohar were hardly 2-3 ft. away from the victim when he was assaulted, there would have been blood on the clothes of these two witnesses. The witnesses were not expected to remain at the same place witnessing 10-12 blows being given to the victim from the distance of 2-3 fit. If all the five accused with weapons in their hands were assaulting the deceased it was physically impossible for these two witnesses to remain in the vicinity of 2-3 ft. from the victim and also remain there witnessing the assault till 10-12 blows were given to the deceased. It has come in their cross-examination that when they saw accused coming with the weapons there was no apprehension in their mind. Naturally, unless the accused had uttered some words indicating that they had intention to

assault any of them they would not have gone from that place and once the assault started the witnesses must have apprehended that they being from the group of Mustaffa may also be the target and, therefore, they had to run away from that place to escape themselves from the assault. The names of the accused were told to the two constables Jagtap and Patil both by PW 6 Nasir when he met them while running away from the place of incident and also by PW 7 Akram who took the injured to the hospital. Even PW 8 the complainant had, after seeing Akram taking injured to the hospital, gone to the hospital and from the hospital he went to the police station and lodged his complaint naming all the five accused persons within short time after the incident.

19. The other reason for not believing the eye witnesses is that though according to the witnesses the assault was made outside the Central Hotel, no blood was noticed at that spot. This criticism is levied on the ground that when 10-12 blows were given to Mustaffa as per the statement made by PW 6 in his cross-examination the blood must have been found at that place and, therefore, the eye witnesses cannot be believed. All the witnesses including the police constables had seen the motorcycle of deceased

Mustaffa having parked outside the Central Hotel. As the hotel had closed at about 10.30 in the night two eye witnesses and Musttaffa came out and were chit-chatting outside the Central Hotel near Motorcycle when the accused came there and started assaulting Musttaffa. The two eye witnesses had to run away to save their lives. Naturally, deceased Musttaffa must have also tried to run away to escape the assault and he must have run away immediately after his two companions Manohar and Nasir ran away from that place and ultimately he fell down because of the injuries at a place which is hardly 96 ft. from the original spot where he was talking with his two companions.

20. It is contended that when according to the evidence of eye witnesses they were just 2-3 ft. away from deceased Mustaffa when he was assaulted, there ought to have been blood on the clothes of the eye witnesses. The trial court has over emphasised the statement of the complainant in his prolonged cross-examination that the witnesses were standing just 2-3 ft. away from Mustaffa when he was being assaulted and disbelieved their presence as their clothes were not stained with blood when as per the evidence of the eye witnesses, again in lengthy

cross-examination, in their presence 10-12 blows of swords were given to Mustaffa. As stated earlier the witnesses were subjected to lengthy and protracted cross-examination by four defence advocates. It is common knowledge that when minor details are asked in the cross examination, the witnesses not knowing the law are only likely to carry the impression that unless they answer in a particular way or admit certain suggestions put to them in cross-examination they cannot be believed to have witnessed the incident. It is physically impossible for the witnesses to stand within the space of 2-3 ft. from the person who is being assaulted by not one or two but by five persons with deadly weapons. Similarly, if the witnesses had to take to their heels apprehending danger to their own lives surely they would not wait and stand in the same position in which they were while chit-chatting with deceased when a group of five persons starts mercilessly assaulting one of their companions. The said admissions or statements are also considered by the trial court to falsify the case of the eye witnesses that the assault had started outside the Central Hotel. The trial Judge before whom witnesses are examined must know in what circumstances particular answers are elicited from the witnesses in cross-examination. The

reasoning given by the trial court is that if the deceased was given 10-12 blows on vital parts of his body at that place sufficient blood must have fallen at that place. Firstly, there was no reason for the witnesses to falsely state that the assault had commenced at that place. If they had been procured witnesses surely they would not have stated that the assault had commenced outside the Central Hotel but would have deposed that the assault had taken place at the place where the blood was found i.e. the place from where PW 7 and PW 11 picked up injured Mustaffa in the autorickshaw and taken to the hospital. Secondly, the person who was being assaulted would try to escape by moving away from that place and PW 6 has also stated that all of them started running away. If the portion of neck had been cut, the blood would have started oozing out immediately and left a track at the place where the assault commenced or on the way from where the injured tried to run away. The deceased was assaulted on the head, face, chest and on hand as per the deposition of eye witnesses with swords. In that case the blood cannot ooze out and fall on the ground immediately after the attack. The blood which comes out of the body initially due to the assault on the above parts of the body will be absorbed in the clothes of the injured first. One cannot be oblivious

to the fact that the deceased was young person hardly 22 years old and, therefore, it is most likely that if he could not resist the attack he would at least try to run away because of young age inspite of the initial assault made on him.

21. The trial court has disbelieved eye witnesses also on the ground that there was previous enmity between the witnesses and the accused persons and the witnesses were friends inter se. Complainant Manohar was prosecuted for kidnapping accused no.2 Sunil Pardeshi and for assaulting accused no.3 Balu Chavan with a knife previously. He was prosecuted along with deceased Mustaffa. The trial court has also referred to the criminal record of deceased Mustaffa and that eye witness Nasir PW 6 was associated with one Umesh Shetty against whom number of criminal cases were filed. Merely because the witnesses and the deceased had criminal background and/or both the witnesses were having enimical relationship with the accused that cannot be the ground to discard the evidence of eye witnesses. Previous enmity is very oftenly stated to be a double edged weapon which also constitutes motive for the crime. It is most likely that the accused were taking revenge of the previous crime committed by the deceased along with Manohar against the accused

which constitutes motive for the accused to assault Mustaffa. The reasoning of the trial court that in that case the accused ought to have assaulted eye witness Manohar also cannot stand to reason. May be they had intention to assault Manohar but he having run away from there immediately when the assault began on the deceased, he escaped from being assaulted. It is also possible that the accused wanted to assault Mustaffa first and, therefore, they attacked him first but such minor points and the minor discrepancies cannot be used to falsify the evidence of eye witnesses which has been supported and corroborated by other circumstances on record.

22. The trial judge has also again and again observed that he is trying to scrutinise the evidence of eye witnesses minutely because the witnesses have given minute details pointing out the time within which the assault had taken place. The closing time of Central Hotel was 10.30 p.m. and, therefore, three persons i.e. Mustaffa and two eye witnesses came out of that hotel. Manohar is stated to have gone to the police station at about 11.20 and lodged his report and the crime was registered at 11.35 p.m. During the period between 10.30 to 11.20 the assault had taken place and the injured was taken to the hospital. If

one sees the distance from the spot where the assault commenced and the place where Mustaffa was lying injured and the situation of Parmar Hospital which is also in close vicinity, it cannot be doubted that the incident had taken place within that period and the injured was taken to the hospital by 11 p.m. Even the Lonavala Railway Station is not far from the place of offence where complainant had taken shelter after running away from the place of offence when the assault commenced on Mustaffa and by the time he returned from there injured was being taken to the hospital and, therefore, he also went to the hospital. Even the police station is not that far and when Nasir PW 6 was running towards the side of police station he met the constables on the way and told them about the incident of assault. If the eye witnesses had been falsely procured as suggested on behalf of defence, there was no necessity for the witnesses to talk about the initial assault at the place where there were no blood stains and then show other place where the injured fell down because of the injuries and then depose about the complainant running towards the railway station while Nasir running towards police station and then depose about the constables meeting them on the way and then they coming at the place of incident because according to Nasir the incident was

going on that time but when they went there they did not find Mustaffa because in the meantime Akram along with Kamar noticed the injured Mustaffa and took him to Parmar Hospital. Surely the procured eye witnesses would not go that far and give evidence in that fashion unless it was truthful. The procured eye witnesses would have straight way shown the place where the blood was seen as the place where the assault began and it ended and they would not have given the evidence in which there was interaction between three constables and two witnesses PW 7 and PW 11 who had taken the injured to the hospital. Unfortunately, the trial court had failed to appreciate this important aspect and has discarded the evidence by highlighting minor discrepancies. According to the trial judge he had to scrutinise the evidence of eye witnesses more cautiously because of the previous enmity. But scrutinising the evidence closely and cautiously does not mean that the minor discrepancies should be blown out of proportion and discard the evidence of eye witnesses altogether. The fact that motorcycle of Mustaffa and his slippers were found outside the Central Hotel lend support to the prosecution case that assault had begun there.

23. The trial court has also discarded the

evidence of eye witnesses on the ground that independent witnesses from the place of incident were not examined. It is common knowledge that the independent witnesses from the locality do not come forward to give evidence against the accused. It would take extra ordinary courage for a businessman who was running the Central Hotel or Pan Shop or other stalls in that area to come out openly and give evidence against five accused who could commit a ghastly murder at a public place. It is not that in this case the Investigating Officer had not made any effort to secure the evidence of independent witnesses. In para 9 of his deposition PI Bival has stated that he had recorded the statement of Sanjiv Poojari, the proprietor of Ganesh Pan Stall but he was not carrying on the business at the time of the trial which began four years after the incident in question. He has further deposed that whereabouts of that witness were not known. He has also deposed that he had recorded the statement of one Narendra Mahadeo Kadam but he was removed from the service and was not traceable. He had also recorded the statement of Manjiri Ibrahim, the cashier of Central Hotel but he had also left that place and his whereabouts are not known. Merely because eye witnesses were from the other group it cannot be said that the witnesses would

falsely rope in the accused leaving the real assailants scot free. The witnesses are not expected to do so in a case of murder like this. The trial court has failed to appreciate that if the witnesses and the deceased had enmity with only two or three accused why should they implicate five accused persons, who were named immediately after the incident in question.

. The trial court has wrongly discarded the evidence of eye witnesses on the ground that prosecution had not examined any witness from the number of persons allegedly gathered on the spot to show that the deceased had run away from first spot of incident to second spot of incident. The alleged presence of number of other persons on the spot is again figment of imagination of the trial judge. No witness has stated about the presence of the public at the place and time of incident. The statements of three witnesses from the hotel and pan shop were recorded but by the time the trial had begun they had left those places and there was no information about their whereabouts. It is different thing that in such cases no independent person, even if he had seen the actual assault, would have liked to burn his fingers and take risk by giving evidence against the accused

after seeing the brutal assault on the deceased. The reasoning of the trial court in discarding the evidence of eye witnesses is absolutely illegal and cannot sustain in law. The reasoning of the trial court is not in accordance with the probabilities and facts of life but the ocular evidence of the main witnesses has been discarded by highlighting and over emphasising the minor discrepancies which are natural in such case. On behalf of the State judgment of the Supreme Court was cited in the case of Krishnan and anr. vs. State reported in **(2003) 7 SCC 56** in which it is held that when ocular evidence is found to be cogent, consistent and trustworthy, same cannot be discarded merely on the basis of some hypothetical answers of medical witnesses and minor variations with medical evidence.

24. The trial court has also observed that if there was rain at that time as stated by one of the eye witnesses i.e. PW 6 Nasir then there would have been mud on the chappals which were found on the spot as well as on the clothes of the deceased, but there is no evidence to that effect. The incident had taken place in the middle of July which is a period when normally there is heavy rain on the coastal land of the State of Maharashtra. It cannot be ignored that

Lonavala has much more rain fall than the other parts of the State and it rains in Lonavala even when there is no rain in other parts around Lonavala as it is situated on a hill. The witness had not said that there was heavy rain at that time or that it was raining at the time of assault or earlier or thereafter. If it had been raining heavily that time the witness certainly would have said so. But one cannot forget that the witnesses were giving evidence after a period of four years. Moreover, the panchanama would not mention unless it was relevant to note that the chappals found on the spot had mud on them. Then the trial court has observed that if the assault had taken place near the motorcycle then the motorcycle would have fallen down and would not have remained in the same parking position. We are afraid that this cannot be the ground to discard the evidence of the eye witnesses. The trial court has wrongly opined accepting the argument of the defence advocate that since the motorcycle had not fallen down and there was no mud on the slippers, the evidence of eye witnesses is concocted. The absence of blood stains on the chappals found at the place also has been wrongly used to discard the evidence of eye witnesses.

25. Because the eye witnesses stated that accused

did not say anything either to Mustaffa or them before they started assault and the witnesses did not raise hue and cry and did not try to rescue the deceased Mustaffa though no threat was given to the witnesses, the trial court considers the conduct of the eye witnesses in not trying to rescue deceased Mustaffa as unnatural. According to the trial judge because of the previous enmity there ought to have been exchange of words and when the witnesses do not depose about any exchange of words or any talk between them, the evidence of eye witnesses can be considered as false. The trial judge expected that while running away the witnesses ought to have raised hue and cry. One cannot understand the logic of this reasoning either. If the witnesses were running away to save their lives, they cannot be expected to raise hue and cry so that the accused should chase them. They would rather try to escape themselves from the scene unnoticed by the accused. Did the trial judge expect that if witnesses had raised hue and cry any person from the locality would have come to rescue Mustaffa who was being assaulted by five persons carrying deadly weapons in their hands. Such type of reasoning itself is unsustainable in law. It is unreasonable to expect the eye witnesses to intervene to rescue Mustaffa against the attack on him by five persons with deadly

weapons.

26. The trial judge has forgotten that the witnesses were giving evidence of minor details after lapse of four years. When it was late night in a place like Lonavala particularly during rainy seasons if some or the other person somewhere was present in that octroi post the witnesses cannot be expected to note or remember about their presence. According to the trial judge in ordinary course of conduct the witness should have entered the octroi post rather than running a long distance towards Royal Bakery which was about 150 ft. away. In our view because the witness had not said about the presence of the other persons cannot make him untrustworthy. Then the trial court has observed that even after seeing the accused coming towards them they had continued to talk casually among themselves because they were not expecting any assault and therefore, their conduct was unnatural. How the witness would react in a given situation cannot be imagined in the court room. Different persons react in different ways in such situation.

27. The witnesses are also not believed because they had stated that all the accused were carrying

swords but the recovery was made at the instance of accused only of two swords, one pipe and two daggers. When in the night time assault takes place by five persons, the witnesses are not going to wait and observe minutely the weapons carried by each of the accused persons. Out of the above types of weapons sword can be noticed more easily due to the way it is handled. It is difficult to notice dagger in such brief span of time. Having noticed swords in the hands of few or even two persons, the witnesses are likely to think that probably all the accused persons were carrying swords and, therefore, when they stated that all the accused were carrying swords they cannot be disbelieved on that count. The trial court has also commented upon the evidence of the witnesses when they have stated in their lengthy and irrelevant cross-examination as to in which position they were standing and which side they were facing. The trial judge forgot that this was stated in the cross-examination after lapse of four years which was not stated before the police and it was absolutely irrelevant aspect. The trial court ought not to have allowed such irrelevant questions in cross-examination of the witnesses. When the questions are asked in the cross-examination and allowed by the court, the witnesses tend to think that it is something relevant

to be told to the court otherwise their evidence would be discarded. But to discard the evidence of the witnesses on that ground is something which is absurd and astounding.

28. The trial court has then observed that the omission to mention in the FIR that the witnesses were waiting for arrival of Akram is fatal. First of all that circumstance is not relevant for the main offence of assault. The FIR is not supposed to contain each and every minor detail but can only consist of the relevant and essential facts. The fact that witnesses were waiting for the arrival of Akram relates to something which transpired before the incident of assault. It is significant to note that the FIR does mention that Akram had taken the injured to Parmar Hospital in his autorickshaw.

29. Then the trial court has observed that the witnesses do not know the difference between sword and dagger and pipe, but only knew the difference between sword and iron pipe. These aspects are also too insignificant for this court to consider even in an appeal against acquittal. The reference to insignificant aspects and material by the trial court galore in this case. If unnecessary exercise is

undertaken to deal with such reasoning of the trial court in this appeal against acquittal it would only add to the pages of the judgment on trifles. Whether a witness is truthful or not and in particular whether he was an eye witness to the incident or not can be discerned immediately after noting the broad features of the evidence led by the prosecution and the court is not required to consider the trifles to brand a witness as false. The trial court has also criticised the evidence of witnesses including the police constables who stated that no other person was present at the place of incident at that time on the ground that considering the place of incident it was probable that number of persons must have been present there at least after hearing the hue and cry of Mustaffa. According to the trial court number of persons would have come there after hearing hue and cry of Mustaffa. To expect the crowd to assemble at a place where a person is being mercilessly assaulted by five persons with weapons like swords at that hour of the night is most unreasonable to say the least. The trial court has also considered the statement of Manohar in the cross examination that blood was oozing from the wounds of Mustaffa when he ran from the spot and, therefore, according to the trial judge blood ought to have been noticed at that place. The learned trial

judge has failed to appreciate that if it was rainy season and if it was raining either before or after the incident small stains of blood fallen on the ground could not have been noticed at 12 O'clock in the night when spot panchanama was drawn. The trial court has not been able to appreciate properly the judgment of the Supreme Court cited on behalf of the prosecution. For instance, in the case of Rana Pratap vs. State of Haryana reported in AIR 1983 SC 680, the apex court has observed that every person who witnesses the murder reacts in his own way and there is no set rule of natural reaction and to discard the evidence of witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. To borrow the words of Supreme Court, the trial court has appreciated the evidence in a wholly unrealistic and unimaginative way. The trial court has certainly erred legally in observing that the conduct of the eye witnesses was unnatural on the basis of trifles and insignificant admissions or statements extorted in the lengthy and irrelevant cross examinations of the witnesses allowed by the trial judge.

30. The trial court has doubted the filing of the

FIR at 11.20 p.m. on that night i.e. within hardly 40 minutes from the time of the incident on the ground that the FIR was sent to the court not on the following day but on 15th of July 1989. Firstly, the trial judge wrongly observed that there was delay of two days in filing the FIR in the Magistrate's court. The FIR was lodged at about 11.20 p.m. on the night of 13th July 1989 and on the following day as explained by the Investigating Officer he was on bandobast duty which must be a holiday for the court due to festival of ID. Thus there was no delay when FIR was filed on 15th July 1989. The FIR was lodged in the midnight between 13th and 14th of July 1989. It could have been only filed sometime in the course of the day on 14th July 1989 but instead it was filed on 15th July 1989. That delay is explained by the Investigating Officer and, therefore, the trial court was wrong in disbelieving the contents of FIR, which include the names of all the five accused persons. According to the trial judge the FIR was filed on 15th July 1989 after deliberation. The trial Judge could not have jumped to that conclusion nor the doubt can be said to have arisen about truthfulness of the prosecution case or the versions of the eye witnesses on that count. It is pertinent to note that spot panchanama Exh.76 was drawn undoubtedly at 12 O'clock

i.e. immediately after the crime was registered at about 11.30 p.m. on that night in which there is mention of C.R. number which could be given only after registration of the crime in question. The spot panchanama is made not only about the place where the blood was found but also of the place outside the Central Hotel, to which reference was made in the complaint (Exh.103) itself. Unless the complaint of PW 8 Manohar was lodged before 11.30 p.m. the police officer and panchas would not have gone to find the motorcycle parked outside the Central Hotel and seize two pairs of slippers lying there. The panchas would not have gone to that place along with the complainant unless reference was made to that place in the FIR itself. Significantly the complainant's name is also mentioned in the spot panchanama. It is most relevant to note, which the trial judge has conveniently ignored, that crime was registered mainly for offence under Section 307 of IPC and not for offence under Section 302 of IPC. The confirmation of death of Mustaffa had come same night at about 1.40 a.m. i.e. after drawing the spot panchanama and thereafter according to Investigating Officer PI Bival Section 302 of IPC was substituted for the offence under Section 307. If the message about the death of the deceased was received at 1.40 a.m., unless the FIR was

lodged earlier than that time the crime would not have been registered for offence under Section 307 of IPC but would have been registered for offence under Section 302 of IPC.

31. Another significant document which squarely supports the prosecution case about the lodging of the FIR at 11.30 p.m. on that night is the entry in the station diary, the extract of which is produced at Exh.142, in which the name of the complainant and five accused have been mentioned. It also mentions C.R. number and the offence under Section 307 along with offences under Sections 147, 148 and 149 of IPC for which the crime was registered. The genuineness of the said document has not been challenged. The trial judge instead of going by the relevant and important documentary evidence has given undue importance to the admissions of the Investigating Officer that the case diary was not written day to day but it was written subsequently. But, for such lapse on the part of the Investigating Officer, which he tried to cover-up by initially stating that he had maintained the diary regularly cannot dislodge the substance of the prosecution case. The trial court instead of looking to the substance of the case has gone after the shadows and has in the process lost the judicial

balance in appreciating the evidence correctly and legally. In the recent decision of the Supreme Court in the case of Krishnan and anr. vs. State reported in **(2003) 7 SCC 56** it has been held that prompt lodging of FIR immediately after the incident rules out any possibility of deliberation to falsely implicate any person in the crime.

32. The evidence of the eye witnesses is not only corroborated by the FIR lodged immediately after the incident and the spot panchanama drawn within an hour's time from the time of incident and further corroborated by the station diary entry referred to above but also by the medical evidence.

33. The prosecution has examined Dr. Parmar who had examined the patient at his hospital which is near the place of incident at about 11.10 p.m. He has deposed that on the night of 13/7/1989 at about 11.10 p.m. Mustaffa was brought to his hospital in injured condition. He gave him first aid and advised to shift him to Pune as the patient was serious. His statement was recorded on the following day. He has issued certificate Exh.107 about the injuries noticed by him. He had asked about the history from the person who had accompanied the patient and has noted that Mustaffa

had sustained injuries in fight. He has deposed that he was in hurry in giving first aid and, therefore, noted only the major injuries on certificate Exh.107. That certificate is produced on record by him and proved by him. Much ado has been made about this witness having deposed before the court that he had noted the history of injuries as having been sustained in fight. The trial judge has, therefore, tried to make much ado by referring to the history of fight and not of assault given by the companion of the injured Mustaffa to doctor Parmar. The whole edifice of the reasoning of the trial judge falls to the ground if one cares to see certificate dated 14/7/1989 issued by this doctor in which in his own hand writing he has noted history of assault and not of fight, about which both the defence and the trial judge are over ebullient. The trial judge ought to have taken care to see the certificate exhibited before him as Exhibit 107 and gone by that rather than go by the oral evidence which was given after a period of four years from the date of the incident. Even the Additional Public Prosecutor who appeared in this case did not bother to point out to us this vital material which completely answers the point raised on behalf of the defence and upheld by the trial court.

34. The prosecution has also examined PW 9 Dr. Kevaliya who performed autopsy on the dead body. The post-mortem was performed on the dead body on 14/7/1989 at 9.30 in the morning. He noticed 28 external injuries, most of which were incised wounds, on various parts of the body like chin, head, face, chest, scalp, parietal-occipatal region. There are also stab wounds in the chest and chop injuries on the arms, neck and thumb. Then there are abrasions. According to him all the injuries were antemortem and were fresh. On internal examination he found six injuries and the cause of death was haemorrhage and shock as a result of injuries. According to his deposition the stomach was containing semi solid food material and external injury nos.7 and 8 were individually sufficient to cause death in the ordinary course of nature. He has also deposed that external injury nos.3 to 6 were collectively sufficient to cause death in the ordinary course of nature. He has further deposed that except external injury nos.9,10,17 and 18 all other injuries are collectively sufficient to cause the death in the ordinary course of nature. He has also deposed that incised, chop and stab wounds described in the post mortem notes were possible by the use of swords article nos.16 and 17 or by similar type of swords. Thus, the evidence of Dr.

Kevaliya corroborates the evidence of eye witnesses in two ways. Firstly the injuries noticed on the person of the deceased were possible due to the assault with swords article nos.16 and 17 or similar swords because as per the evidence of eye witness the accused had assaulted deceased with swords. Secondly from the number of injuries noticed on the dead body, it is clear that deceased must have been assaulted by number of persons using deadly weapons otherwise there would not have been 28 external injuries on the person of the deceased.

35. Dr. Kevaliya is M.D. in Forensic Medicine. According to him he must have approximately performed autopsy on not less than 1000 bodies and had written thesis on post-mortem study of head injury cases. He has denied emphatically suggestion made to him in the cross examination that person suffering from such injuries (like deceased Mustaffa) on head, chest and hand was not in a position to walk. The trial judge has made much out of the admissions in the cross-examination of the eye witnesses that they had seen about 10-12 blows given to the deceased on the spot. Surprisingly the defence advocate even goes to the extent of showing that this was an improvement as their police statements does not make a mention that

they had seen 10-12 blows given to the accused before they ran away from that place forgetting that these admissions were extorted in the cross-examination. Taking that as a base, eye witnesses are disbelieved on the ground that the person having received 10-12 blows causing injuries on vital parts of the body like head, chest etc. would not have been able to walk or run from the first spot and go to the second spot which is about 94 ft. away and in that event blood would have oozed so much from the body of the deceased that it would have left track of blood on the road passed by him and in that case he would have fallen then and there and could not have run any distance.

36. Dr. Kevaliya, who is such a highly qualified and experienced doctor, has emphatically denied that it was not possible for the patient to walk after receiving those injuries. Secondly one cannot go by the statement extorted in the cross examination that the witnesses had seen Mustaffa receiving 10-12 blows at the first spot itself before they took to their heels. After all it is the function of the court of law to appreciate the evidence by considering the manner in which admissions were elicited and the circumstances in which evidence was given before branding a witness as false. The said doctor has also

emphatically denied that in this case the injured in all probability must have died an instantaneous death even after receiving 28 external injuries on his person or even gone into unconscious condition immediately.

37. The next piece of evidence relied by the prosecution is the oral dying declaration made to PW 7 Akram and PW 11 Kamar Ansari. PW 7 is an autorickshaw driver. When he was taking a passenger from near the Central Hotel he noticed his three friends i.e. two eye witnesses and deceased Mustaffa chit-chatting there. He took his autorickshaw near them to ask them to wait till he returned after dropping the passenger at his destination as he wanted to talk about next day's Id day program with them. After dropping the passenger, he went back to the said place but in the meantime the accused had assaulted the deceased and he had fallen down at a place at some distance from there. PW 8 Manohar and PW 6 Nasir had run away from that place seeing the assault on Mustaffa. PW 7, therefore, did not find any of them present there when he went back to meet them as promised along with Kamar Ansari PW 11 who met him on his way to Central Hotel. The rickshaw was, therefore, taken to Jakatnaka at Jaichand Chowk where there is a rickshaw stand. On the way to Jakantnaka in between Jakatnaka and

Bhagyalaxmi Bhail Bhandar both PW 7 and PW 11 heard the voice "ma", "ma". They recognised it to be of Mustaffa and, therefore, they went towards him. They saw Mustaffa in injured condition. On enquiry by PW 7 Akram as to how those injuries were caused to him, injured Mustaffa told him that they were caused by Jamir, Sunya Pardeshi, Kishya Pardeshi, Balaya and Kailas i.e. five respondents-accused. Injured Mustaffa was picked up by these two witnesses in Akram's auto-rickshaw for taking him to nearby hospital of Dr. Parmar.

38. The evidence of PW 7 Akram is supported and corroborated by PW 11 Kamar Ansari, who had accompanied him, about the oral dying declaration made to them by injured Mustaffa. The statements of both these witnesses were recorded on the following day i.e. 14th July 1989 and there is no omission pointed out in their evidence not only as regards the oral dying declaration but also about other aspects deposed to by them regarding meeting the police constables on the way. When injured was taken by Akram and Kamar in the autorickshaw to the hospital they met police constables. The witness, therefore, informed the police that Mustaffa told them that five accused named by injured Mustaffa and by this witness to the police

had assaulted Mustaffa.

39. The evidence of these two witnesses about the oral dying declaration is corroborated by PW 12 and PW 13 both of whom are police constables. PW 12 constable Jagtap has deposed that Akram informed him that these five accused i.e. Kailya, Balya, Sunil, Jamir and Kisan assaulted Mustaffa and they were taking Mustaffa to hospital. He has further deposed that Kamar was also present in that auto and he asked constable Patil to accompany them in the rickshaw to the hospital. Similarly, PW 13 constable Patil has deposed that when he was talking with constable Jagtap at Jaichand Square one auto rickshaw came from the opposite direction and halted near them. Rickshaw was driven by PW 7 Akram and Kammu (PW 11 Kamar Ansari) was sitting in that rickshaw and Mustaffa was lying in injured condition in that auto rickshaw. That time Akram informed them that Mustaffa told him that Balu, Kisan, Jamir, Sunil and Kailas i.e. five respondents-accused assaulted him with swords. Even the statements of these two constables were recorded on 14th July 1989. One would wonder as to why there should be introduction of these two constables also as witnesses if eye witnesses had to be procured. If it was a case of concoction why they had to bring in more

witnesses to create confusion and in the process allow the doubt to be created in the evidence of the witnesses. It is well settled that even on the basis of oral dying declaration, as observed by the trial judge himself in this case, the conviction could be based but in this case oral dying declaration is not the sole basis on which the conviction of the respondents-accused is required to be based. One would also wonder that when there is evidence of eye witnesses why the prosecuting agency or the witnesses think of falsely creating evidence of oral dying declaration.

40. The evidence of Akram is challenged on the ground that the panchanama of auto-rickshaw was not drawn because blood must have fallen in the auto-rickshaw when the injured was taken to the hospital. That would have been one more circumstance to prove that Akram had taken the deceased to the hospital in his auto-rickshaw. From the cross examination of this witness it does not appear that the defence has challenged that the deceased was taken to the hospital in his autorickshaw.

41. The evidence of PW 7 Akram Pathan has been criticised on the ground that his conduct in not going

to the police station when he took complainant Manohar in his autorickshaw to the police station after taking injured to Dr. Parmar's hospital is unnatural. Akram Pathan was not an eye witness to the incident and the FIR is lodged by the Manohar who was an eye witness to the incident. At that time in order to set the prosecuting agency in motion what was required was to lodge the complaint and register the offence before further steps in the matter were taken. The complaint of eye witness Manohar was important and had to be recorded before the statements of other witnesses could be recorded. Therefore, it was not necessary for Akram to go to the police station to lodge the complaint at that time. It was not necessary for him to wait at the police station when the complaint of Manohar was being recorded. Since he was having autorickshaw he had done his duty first to take the injured to the nearest hospital for receiving immediate treatment to save his life and secondly to take Manohar to the police station whose complaint had to be recorded. The fact that Akram had taken injured to Parmar Hospital in his auto is mentioned in the FIR Exh.103. This was noticed by Manohar and, therefore, he has mentioned it in the complaint that he had seen Akram taking injured Mustaffa to Parmar Hospital in his autorickshaw and, therefore, he also followed that

auto and went to the Parmar Hospital and saw Mustaffa in injured condition. Only because complaint does not make a reference to Akram having told two eye witnesses and Mustaffa while chit-chatting outside the Central Hotel to wait for him till he comes back after dropping the passenger to discuss about next day's Id program cannot be the circumstance to disbelieve the evidence of Akarm PW 7.

42. The evidence about oral dying declaration is mainly challenged and disbelieved on the ground that considering the number of injuries Mustaffa had received it was not possible for Mustaffa to have made oral dying declaration to Akram in the presence of Kamar Ansari PW 11 as to the assault made on him by five accused persons. As stated earlier, the fact that such statement was made by injured Mustaffa to Akram is not only supported by PW 11 Kamar who had also gone to see injured in the autorickshaw of Akram but is also corroborated by two constables PW 12 Jagtap and PW 13 Patil to whom Akram had informed that deceased on enquiry told him that these five accused had assaulted him because of which he had received those injuries. Why these two police constables who were not members of the investigating agency should have supported the testimony of Akram and Kamar, not

in the court for the first time but right from the beginning as no omission is shown regarding that in their statements recorded on the first day. This is not a case which was only depending on the oral dying declaration for securing conviction of the accused that the police and or the witnesses had to concoct or introduce the oral dying declaration.

43. The medical evidence on the record does not rule out the possibility of injured Mustaffa being in a position to say so to Akram on enquiry about the injuries on his body shortly after the incident of assault in question. At 10.30 p.m. Central Hotel closes and, therefore, the witnesses along with Mustaffa came out of that hotel and were chit-chatting outside the said hotel. After some time when Akram sees them and asks them to wait for him till he drops his passenger and comes back after dropping passenger who was in his autorickshaw at that time. When Akram returns, these three persons were not there outside the Central Hotel but Mustaffa was seen in injured condition at a distance of hardly 94 ft. From there he was taken in the same autorickshaw to the hospital. By the time Dr. Parmar examined Mustaffa in his hospital it was 11.10 p.m. It means Mustaffa was examined by Dr. Parmar within half an hour of the

incident in question. The patient must have been taken to the hospital at about 11 p.m. or even earlier because Dr. Parmar was not in the hospital when the patient was taken there and he had to be summoned from his residence. This means that the time span between the assault and Akram and Kamar seeing Mustaffa in injured condition pursuant to his cry heard by them must be hardly 10 to 15 minutes. Therefore, question that has to be considered is whether the injured who could walk for some distance after part of the assault on him was in conscious condition and was in a position to speak to make an oral dying declaration. In this respect it may be pointed out that Dr. Parmar who was first to examine Mustaffa had found him in conscious condition which must be at 11.10 p.m. The witnesses do not say that injured Mustaffa had said anything to them when he was being taken in the autorickshaw. According to these two witnesses i.e. PW 7 and PW 11, they heard the cry of Mustaffa which attracted their attention towards him and, therefore, rickshaw was taken near him. Before Mustaffa was lifted and kept in autorickshaw and while he was lying in injured condition Akram had asked the cause how he got those injuries about which he also speaks to two constables who met them on the way towards hospital. The medical evidence has to be

considered in the light of these circumstances and also the circumstance that when there were eye witnesses to the incident one of whom had lodged complaint immediately to the police whether there was any necessity to concoct and introduce oral dying declaration without which names of the accused could not have come to light.

44. PW 9 Dr. Kevaliya who performed post-mortem on the dead body was cross examined at length on behalf of the defence, to which reference was already made. He is highly qualified and very experienced doctor. He has stated in his cross examination that if a blow with substantial force is given on the head causing the kind of injuries found on the dead body a traumatic shock is not necessarily set in immediately nor can it be said definitely that due to those injuries traumatic shock had to be set in immediately. He has firmly stated that in all probability there is no possibility of immediate traumatic shock in the said situation. He has also stated that the period of unconsciousness varies from second to minute and hours. He has further stated that he could not give any opinion whether the speech centre of the injured could have damaged on account of external injury no.4 in association with internal injury no.6, nor it can

be said that there was possibility of sudden loss of memory in that situation. Similarly he has stated that it cannot be said that due to heavy blow on the head there is more possibility of person suffering from concussion. He has also denied that in this case the victim must have died instantaneous death in all probability. He has given reasons why there was no cause for instantaneous death. He has further emphatically denied the suggestion that person suffering from such injuries on head, chest and hand could not be in a position to walk. Thus, the doctor who performed post-mortem operation has not ruled out the possibility of victim walking some distance after receiving those injuries on his person and also not being in a position to speak as he was not likely to necessarily become unconscious immediately or suffer instantaneous death. If the medical evidence does not rule out the possibility of the victim being in a position to walk some distance after receiving those injuries and also being in a position to speak to make an oral dying declaration, why the evidence of these two witnesses should be discarded, especially when they are corroborated in that respect by two police constables and it was not a case of want of evidence that prosecuting agency had to concoct oral dying declaration. One cannot forget that the incident had

taken place in the late hours of night and the statements of all these four witnesses including two constables were recorded on the following day.

45. After not being able to bring home the point through the cross examination of Dr. Kevaliya that it was not possible for the victim to walk and speak within short time after the incident and make a oral dying declaration after receiving those injuries, the defence has led the evidence of one doctor who was willing to oblige the defence even in the absence of regular summons issued to him by the court though he was attached to a Government Hospital. But inspite of his best efforts even he could not rule out the possibility of such injured person being in a position to walk or speak immediately or within short time after the incident in question. That witness is Dr. Pherwani examined as Defence Witness No.1. He has done his M.B.B.S.D.V.D. from Pune University and was associated with Forensic Department of B.J. Medical College as against the degree and thesis to the credit of Dr. Kevaliya PW 9 who had performed autopsy on the dead body in this case. Defence witness Dr. Pherwani has also performed several autopsies and has deposed that looking to the injuries on brain, face and buttock the person could not run away after receiving

those injuries. He has further stated that when the left lung had totally collapsed and right lung had partially collapsed, it would be difficult to breath and because of that he would not be in a position to speak. In his cross-examination this doctor has, however, admitted that he had no opportunity to see the victim at the time of post-mortem nor to examine injuries of the victim and he had not discussed the matter with the doctor who performed the post-mortem examination. He has agreed with the quotation from Modi pointed out to him that in a case of concussion of the brain resulting from a sever blow on the head, shock usually appears immediately after receiving injuries but it may supervene after some time if the individual at the time of receiving injuries was in a state of great excitement and mental preoccupation. He has also agreed with the proposition laid down by Modi, wherein it is pointed out that a few cases have been recorded in which the victims were able to perform some act like walking or climbing requiring some exertion and yet survived for some hours or days after receiving very grave injuries which would ordinarily have proved rapidly fatal. He has also agreed with the proposition laid down by Modi that in the case of larynx, speech is possible if the wound is above the vocal cords even if it is gaping. But if

wound is below the vocal cords one may be able to speak in a whisper if the wound is not gaping sufficiently to allow air to pass into the mouth. He has also agreed with the proposition laid down by Modi that the wounds are usually fatal from shock and haemorrhage except in a few cases where the individual has been able to walk some distance and has performed some other volitional acts after receiving the injuries. Thus, the possibility of the victim walking some distance and being in a position to speak to make the oral dying declaration which was made before two witnesses has not been ruled out even by Dr. Pherwani who was examined as defence witness.

46. The medical evidence is after all an opinion evidence and when the possibility of the victim with those injuries being in a position to walk some distance and being in a position to speak to make a oral dying declaration is not ruled out completely, why should the court distrust the witnesses and discard the ocular evidence when, as discussed earlier, those witnesses had no reason nor necessity to concoct the oral dying declaration when there was already ocular evidence of the eye witnesses to the incident. In the instant case the evidence about oral dying declaration is not the main evidence but only

supporting evidence.

47. The next circumstance relied on by the prosecution is the recovery of weapons at the instance of the accused. The accused were arrested on 20th July 1989 and the discovery was made at the instance of accused no.1 pursuant to the statement made by him on 22nd July 1989. In this respect apart from the evidence of Investigating Officer, there is evidence of PW 4 Raju Naidu, who acted as panch for the discovery. Accused no.1 made a statement on 22nd July 1989 in the presence of panchas about the concealment of swords, daggers and pipe on Hanuman Tekadi. The memorandum of his statement is at Exh.91. The police, panchas and all the accused had started in a tempo. The tempo was taken to the place where the weapons were concealed as per the direction of accused no.1. After driving for about 5 kms. distance vehicle was stopped and the panchas and police had to walk along with accused no.1 a distance of about 2 to 2 and 1/2 kms. to reach near Maruti Temple. Accused No.1 took out one gunny bag from cavern of that mountain. The said gunny bag contained two swords, two daggers and one steel pipe. All the weapons were stained with blood. The said weapons were wrapped in separate papers and sealed and the slips with the signatures of

the panchas and the police were pasted. The wrappers were sealed with lakh. The panchanama of seizure of the weapons was drawn which is Exh.92. The panchanama mentions five weapons were having blood stains on it. The evidence of this panch witness is corroborated by Investigating Officer PW 15 PI Bival. As per the C.A. report Exh.122 two swords and two daggers were found stained with blood of group "A" which was also found on the clothes of the deceased as per the same report.

48. The said recovery evidence has not been believed on the ground that there was joint recovery of all the weapons. The learned Judge expects that all the weapons ought to have been hidden separately by all the accused. There is no law that there cann't be joint recovery of the weapons. On the contrary this shows that all the accused had common intention and common object and, therefore, after the incident they clubbed all the weapons together and were concealed at one place in one gunny bag. One has to see this recovery of all the weapons together in the light of the fact to which we will presently advert to that all the accused were absconding and were found hiding at the same place which was a forest. The trial court has not given any importance to the recovery evidence on the ground that the evidence of

eye witnesses has been discarded and, therefore, this circumstance which was the corroborative piece of evidence would not advance the case of the prosecution. This evidence is also disbelieved on the ground that the evidence of eye witnesses was that the accused were carrying swords with which deceased was assaulted, but there was also recovery of two daggers. This aspect is also considered by the trial judge to discard the evidence of eye witnesses because according to them all the accused had assaulted the deceased with swords and the eye witnesses had not referred to the dagger. The trial court has not been able to appreciate that when the incident takes place in the night after 10.30 p.m. at a place like Lonavala which is not as fully lighted as city like Mumbai or Pune where the trial took place, it was not possible for the witnesses in that situation to minutely observe the weapons carried by each of the five accused persons. It is not unlikely that after seeing swords in the hands of some accused, the witness would draw the inference that all must be carrying swords and it was not time to observe minutely what weapons were carried by each of them. That aspect cannot be used to disbelieve the version of the eye witnesses as well as to discard the evidence of recovery of weapons. The place from where

the weapons were recovered was quite distant place. They had to travel 5 kms. by tempo and thereafter walk 2 and 1/2 kms. on foot. The weapons were discovered from near Maruti Temple which was situated at such a place where vehicle could not go. They were wrapped in a gunny bag and hidden in a caber of the mountain and, therefore, could not have been noticed by anybody during those days. In our view the recovery of the blood stained weapons also lends support to the testimony of eye witnesses. The recovery of the weapons made at a lonely place in blood stained condition is an important circumstance which supports the prosecution case and is a circumstance which operates against the accused persons. From the time of the incident the accused were not in their houses. They were on the run and it was necessary for them to hide the weapons on that very night of the incident without loss of further time and without even making an attempt to wash them. They could not have gone in the search of the water that night with a view to wash the blood from the weapons.

49. The next circumstance is that the accused were absconding for a period of one week from the night of the incident till they were traced in a forest where

all of them were found together. The names of the accused were disclosed on the very night. All the accused were residents of Lonavala but inspite of the efforts made by the police to trace them, they were not available for arrest. It would be absolutely unreasonable to doubt the prosecution case that accused were not available at their residences for arrest. It would be too much to say that the police did not make effort to find them out from their residences all those days, though they were available. The Investigating Officer PI Bival has deposed that on 20/7/1989 at 9.00 p.m. he received information that accused were hiding in a forest in village Bushi. PW 15 PI Bival has deposed that they were searching absconding accused till 19th of July 1989 and at about 9 p.m. on the basis of information all the accused were arrested in village Bushi which is a forest area. They were apprehended and brought to the police station. The trial court has disbelieved that the accused were absconding on the ground that though Investigating Officer stated that immediately on 13th of July 1989 he sent police staff for searching all the accused but no written order was issued in that behalf and Exh.132 i.e. the police diary is silent that any attempt was made to search the accused on 13th of July 1989. The trial Judge has completely

forgotten that the crime was registered at 11.35 p.m. on 13th of July 1989 and, therefore, the earliest the police could have issued order for search of the accused would be only on 14th July 1989. The Investigating Officer who was giving evidence after a lapse of four years must not be remembering whether he had started search on 13th or 14th of July 1989. After the registration of crime less than half an hour's time had remained before the commencement of 14th July 1989. The trial court has disbelieved that any search was made for the accused persons on the ground that PSI had not issued any order for search of the accused on 13th July 1989 without realising that there was hardly any time left for him to issue order which would be dated 13th of July 1989. The trial court has also disbelieved the circumstance of absconding of the accused on the ground that PSI did not visit the house of the accused and did not enquire with the family members of the accused on 13th July 1989. Because the search of the accused was not made in their houses or with the family members of the accused in that short duration, the Sessions Judge jumps to the conclusion that the names of the accused were not entered any where until 15th July 1989 when JMFC received the copy of the FIR. But the I.O. did state that on 14th of July 1989 he issued the order

for search of the accused which is ignored by the trial court and it jumped to the conclusion that the names of the accused were not disclosed until the sending of FIR to the Magistrate on 15th of July 1989. So far as the circumstance of absconding of the accused is concerned, it cannot be gainsaid that they were not available for their arrest since 14th July 1989 when the written order was issued for their search by the I.O. or in any event from 15th July 1989 on which date FIR was forwarded to the Magistrate. The fact that the accused were apprehended not from their houses nor from the same town but from different place which is a forest area goes to show that the accused were not available for their arrest at their usual place of residence for a period of one week. Thus the fact that the accused were absconding is an additional circumstance which supports the prosecution case that the accused must be absconding apprehending their arrest due to the offence in question committed by them.

50. The next circumstance against the accused is that the clothes worn by the accused at the time of their arrest were blood stained and when sent to the office of C.A. they were found stained with blood of group "A" which blood group was also found on the

clothes of the deceased. PW 3 Imtiaz Khan had acted as panch for the arrest of the accused. He has deposed that on 20th July 1989 at about 9.30 p.m. he was called at Lonavala Police Station where he was present along with other panch. He had taken the search of the accused. He had noticed injuries on both hands of accused no.1 and accused no.5 having injury on his hand and leg. He has confirmed the contents of arrest panchanama Exh.89. PW 2 Sushil Gupta had acted as panch for the seizure of clothes of the accused under panchanama Exh.87. According to this witness the clothes of five accused worn by them at that time were stained with blood. Police had asked him to inspect the clothes of the accused which they were wearing and on inspection he found that their clothes were stained with blood. The clothes were taken out from the persons of the accused after giving them other sets of clothes for changing. The stains of blood on those clothes were marked by the police with Pen. The blood stained clothes of each of the accused were packed separately and pasted with slips bearing signatures of the panchas and were sealed. He has confirmed the contents of seizure panchanama Exh.87. He has identified article nos. 5 to 10 being the clothes of the accused. Both the arrest panchanama as well as panchanama seizing

clothes of the accused has been proved by the I.O. also.

51. As per the C.A. report dated 30/11/1989 Exh.122, full pant of accused no.1, full pant of accused no.2, open shirt and full pant of accused no.3 and open shirt and full pant of accused no.4 so also full pant of accused no.5 were stained with blood of group "A" which was found on the clothes of the deceased. The said evidence is wrongly disbelieved by the trial court on the ground that though the accused were apprehended in forest area of Bushi village, the arrest panchanama was not drawn at the same place. The trial court ought to have considered that I.O. in his evidence has stated that he had not taken panch with him to the forest of Bushi village because he wanted to immediately rush to the said village as soon as the information was received about the presence of the accused there, lest they would abscond if there was delay in going there for arranging the panchas. He had denied emphatically that the accused had themselves surrendered to the police as stated by all of them uniformly in the written statement filed by them. The trial court has also disbelieved the recovery of blood stained clothes of the accused on the ground that they would not continue to wear same

clothes without washing them for seven days. One has to consider this in the light of the fact that the accused must have run away immediately after committing the offence of murder since they were seen assaulting Mustaffa by two witnesses and, therefore, police would be in their search. After committing offence the accused must not have gone to their residences but must have been in hiding and, therefore, they were not having clothes for changing. They must have made some attempt to wash their clothes but it is common knowledge that if the clothes are not washed properly C.A. may be in a position to diagnose the blood on the clothes. All the accused were wearing coloured pants. Accused no.1 and accused no.2 were wearing blue coloured jeans. Accused No.3 was wearing blue coloured pant. Accused No.4 was wearing black pant and accused no.5 was wearing khaki pant. Those clothes were not soaked in blood as contended before the trial court by the defence counsel but were having only few stains of blood and, therefore, must not have been noticed by the accused to take precaution of washing them carefully. Secondly, the shirt of accused no.1 which was white coloured was having only human blood and the blood group could not be determined. No blood was found on the T-shirt of accused no.2. Similarly no blood was found on the

shirt of accused no.5. Thus, it cannot be said that no attempt was made by any of the accused persons to wash their clothes. Even seizure panchanama of the clothes of the accused mentions that some blood spots appear to have been washed. Thus the blood of the group of deceased was found mostly on the coloured clothes of the accused which must not have been noticed by them. The trial court has thus tried to find some or the other fault with every piece of evidence brought on the record by the prosecution. It is well settled that when the blood stains are found on the clothes of the accused they owe an explanation to the court as to how that blood was found on their clothes.

52. The last circumstance is the injury found on the persons of the accused nos.1 and 5. Prosecution has led evidence of Dr. Saswade PW 14 who had examined accused nos.1 and 5 on 21/7/1989. According to him accused no.1 was having following two injuries on his person:-

1. Incised wound of the size one inch by one forth in transversely at base of left index finger, at anterior aspect of palm,

colour of injury was dark reddish scab seen age of injury might have been within 8 days and it might have been caused by sharp object.

2. Incised wound one inch by one forth inch, transverse at above anterior respect of right wrist, colour dark reddish and scab seen. Age of injury might be 8 days and cause of injury by sharp object.

Accused No.5 was having the following injuries on his person:-

1. Incised wound at anterior size at left side 5 inch below from knee joint, size 1"x1" by three inch transversely direction, colour reddish scab seen.

2. Superficial Linear incised wound at about middle of the right dorsal side at left finger, size 1" x skin deep, transverse direction, dark reddish scab seen, age of injury is within 8 days.

. According to the doctor all the injuries of

both the accused nos.1 and 5 must have been caused within 8 days. The incident was of night of 13th July 1989 and the accused were examined on 21st July 1989. The injuries on accused no.1 might have been caused by the sharp object according to the doctor and the injuries on the person of the accused no.5 could have been caused by hard and sharp object. He has further deposed that injury no.1 which was on the left index finger of accused no.1 was possible due to holding of sword. Similarly he has deposed that injury no.2 on accused no.1 could have been caused by the iron ring behind the grip of sword. He has denied emphatically that the injury no.2 of accused no.1 which was on his right wrist was possible if other person had assaulted him. Both the injuries found on the hand of the accused no.1 were possible while assaulting victim Mustaffa by accused no.1 with sword. Thus the injuries on the person of the accused no.1 are also consistent with the prosecution case and in particular the evidence of eye witnesses. As the name of accused no.1 figures first in the list of accused persons mentioned by the eye witnesses, they must have seen him carrying sword and assaulting Mustaffa. That is how they deposed that all accused were armed with swords. The injuries found on the persons of the accused nos.1 and 5 were not serious but were simple

injuries and they were possible while assaulting the victim. The injuries on the persons of the accused undoubtedly show their presence, at least that of accused no.1 who must have participated in the assault on the victim. However, this circumstance has not been believed by the trial court on flimsy ground. The trial court has wrongly observed that the second injury on accused no.5 was not possible while using sword himself and, therefore, does not consider that circumstance as a corroborative piece of evidence. It is important to bear in mind that accused nos.1 and 5 have not given any explanation in respect of the injuries found on their persons.

54. The prosecution had collected the blood samples of all the accused persons which were also sent for examination by the C.A. None of the accused was having blood of group "A". While blood group of accused nos.1 and 2 is "B" as per C.A. reports Exhs.123 and 124 respectively, blood group of accused nos.3 and 4 is "O" as per C.A. reports Exhs. 125 and 126 respectively and blood group of accused no.5 is "AB" as per C.A. report Exh.127.

55. The trial court has given unnecessary importance to small lapses on the part of the

prosecuting agency and when I.O. was found to say something in his evidence, which was different from the record, the trial court failed to realise that when the police officer was giving evidence after a lapse of four years he was likely to forget some details and make some wrong statements in his evidence due to the lapse of time which cannot be used to brand him as a false witness. The I.O. was Police Inspector, Flying Squad, CID Crime, Pune when he had given the evidence of the case in August 1993 and the incident had taken place in July 1989 when he was attached to Lonavala Police Station. In any event if there are minor lapses in the investigation entire prosecution cannot be thrown overboard including the evidence of eye witnesses. Though the case diary was subsequently produced by the I.O. in the court, the trial judge has wrongly observed in para 42 of the judgment that I.O. had not made any attempt to produce the case diary for the reasons best known to him though he was asked by the court. The trial court has tried to falsify the I.O. with reference to Exh.132 which was not actually the case diary but the notes prepared by the I.O. with regard to the progress of the case for the purpose of giving evidence in the court which had been prepared by him on the basis of his memory. The trial court has also

given unnecessary importance to the Investigating Officer not having gone to Sassoon Hospital to find out as to when injured was admitted to the Sassoon Hospital as according to the trial court it was material for deciding the time in lodging the FIR. The trial court has also given undue importance to the admission of the I.O. that the case diary of 13th and 14th of July 1989 was prepared after 4-5 days. The evidence of eye witnesses and other witnesses cannot be discarded because of minor lapses or irregularities on the part of the I.O. Then the trial court has also wrongly observed that it was not probable for the accused to have assaulted the deceased in the presence of two witnesses and if they had wanted to kill him they would have done so while he was returning alone to his village which was at a distance of 2.17 kms. This is hypothetical. What prompted the accused to assault the deceased on the night and place of the incident is best known to them. All murders are not committed in secrecy. The time chosen was late in the night after shops were closed and but for the fact that two witnesses had run away they might also have been murdered.

56. The reasons given by the trial court are absolutely unreasonable, illegal and not sustainable

in law. The trial court has tried to highlight minor and insignificant discrepancies and has not considered the entire evidence in its proper perspective and has thus arrived at absolutely wrong conclusion. The order of acquittal is, therefore, not at all sustainable in law and needs to be reversed.

57. The defence advocate has placed reliance on certain judgments of the apex court mostly on the point about scope of appeal against acquittal. He relied firstly on the judgment of the Supreme Court in the case of Lalit Kumar Sharma and ors. vs. Superintendent and Remembrancer of Legal Affairs, Govt. of West Bengal reported in **AIR 1989 SC 2134** in which it is observed that if a finding reached by the trial court cannot be said to be an unreasonable finding, then the appeal court should not disturb that finding even if it is possible to reach a different conclusion. In the same judgment it is observed that it is well settled that the power of appellate court to review evidence in appeals against acquittal is as extensive as its powers in appeal against convictions, but the court should be slow in interfering with the order of acquittal unless there are compelling reasons to do so. We have pointed out how the findings given by the trial court, on the basis of inferences drawn

by it, are unreasonable as it has not evaluated the evidence in its proper perspective and, therefore, has not arrived at correct conclusion. In the case of Harijana Thirupala and ors. vs. Public Prosecutor, High Court of A.P., Hyderabad reported in **AIR 2002 SC 2821**, it is held that in appeal against acquittal the interference is not justified merely because other view is possible and the appellate court while reversing the acquittal has to dispel reasons given by the trial court in support of its order. Similarly in the case of Jagan M. Seshadri vs. State of Tamil Nadu reported in **AIR 2002 SC 2399** it has been held that in an appeal against acquittal the High Court has to dispel the grounds of acquittal and that acquittal cannot be set aside merely on the ground that the other view is possible. Reliance is also placed on the judgment of the Supreme Court in the case of Darshan Singh and Ors. vs. State of Punjab reported in **AIR 1983 SC 554** in which it is observed that when conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon. That was the case where dying declaration was the only material to base conviction, which is not the case here. In this case there are several circumstances. The judgment in the case of Hansraj Gupta and ors. vs. Dehra Dun-M.E.T.Co. Ltd.

reported in **AIR 1940 Privy Council 98** has no relevance here. That was a case of fraud and the Privy Council held that fraud has to be established by cogent evidence and suspicion cannot be accepted as proof. In our view none of the circumstances proved by the prosecution in this case are based on suspicion.

58. In the aforesaid circumstances we have no option but to set aside the impugned order of acquittal recorded by the trial court. All the respondents-accused are, therefore, liable to be convicted for the offences under Sections 147, 148 and 302 read with Section 149 of IPC or read with Section 34 of IPC. The respondent No.5 - Original Accused No.5 Kailas Narayan Wagh has been reported dead. Xerox copy of death certificate dated 3/5/2003 in respect of accused no.5 has been produced on behalf of the State. According to the same the said accused had died on 18/4/2001. The said death certificate is taken on record and marked "X" for identification. The appeal, therefore, abates as against respondent no.5.

59. In the result, this appeal is allowed and the judgment and order dated 21/1/1994 delivered by the IXth Additional Sessions Judge, Pune in Sessions Case

No.391 of 1991 acquitting the respondents is set aside and the respondent nos.1 to 4 - Original Accused Nos.1 to 4 are convicted for offences under Sections 147, 148 and 302 read with Section 149 of IPC.

For the offence under Section 148 the respondent nos.1 to 4 - Original Accused Nos.1 to 4 are sentenced to RI for one year and to pay a fine of Rs.1000/- each in default to undergo further imprisonment for two months.

No separate sentence is imposed for the offence under Section 147 of IPC.

For the offence under Section 302 read with Section 149 of IPC, the respondent nos.1 to 4 - Original Accused Nos.1 to 4 are sentenced to RI for life and to pay a fine of Rs.1000/- each in default to undergo further imprisonment for two months.

The respondents-accused shall be entitled for set off under Section 428 of Cr.P.C.

The substantive sentences on two counts shall run concurrently.

The appeal against respondent no.5 - original accused no.5 Kailas Narayan Wagh has abated due to his death.

The respondent nos.1 to 4 shall surrender to their bail bonds forthwith, failing which they shall be taken into custody.

(S.S. Parkar, J.)

(S.R. Sathe,J.)